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SUPREME COURT OF THE UNITED STATES

October Term 1972

No. A-1185

73-132

MARY JANE FRANKLIN and
DONALD FRANKLIN - - - - Petitioners

versus

COMMONWEALTH OF KENTUCKY - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY

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SUPREME COURT OF THE UNITED STATES

October Term 1972

No. A-1185

MARY JANE FRANKLIN and
DONALD FRANKLIN - - - - *Petitioners*

v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY

Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals of Kentucky entered in this case on November 3, 1972.

OPINIONS BELOW

The opinion of the Kentucky Court of Appeals, printed in the Appendix hereto, *infra,* pp. 13-20 is reported at 490 S. W. 2d 148. The trial court, The Shelby Circuit Court, did not render an opinion.

JURISDICTION

The judgment of the Kentucky Court of Appeals was entered on November 3, 1972. A timely petition for rehearing was denied and mandate issued on February 16, 1973. The order and mandate are printed in the Appendix hereto, *infra,* p. 21. The time for filing

a petition for writ of certiorari in this case was extended to and including July 16, 1973, by order of this Court dated May 30, 1973, a copy of which order is printed in the Appendix hereto, *infra*, p. 22. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Whether petitioners were denied due process and equal protection by proceedings had in their absence during trial, wherein the statutory *prima facie* guilt of petitioners concerning the stolen property was conceded by stipulation, made without the knowledge or consent of petitioners?

2. Whether petitioners' constitutional rights of due process were violated by admission of certain incompetent hearsay testimony, thus depriving them of a fair and impartial trial?

3. Whether petitioner Donald Franklin was denied constitutional due process by the inference that his mere possession of marijuana was felonious, that is, for the purposes of sale or other disposal to another person?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Amendment Fourteen of The United States Constitution provides in relevant part as follows:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities

of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Kentucky Revised Statutes

The Kentucky Revised Statutes provide in pertinent parts as follows:

433.290 [1199] Receiving stolen property.

"Any person who receives any stolen property, the stealing of which is punishable as a crime, knowing it to be stolen shall be liable to the same punishment as the person stealing it. Any person who violates this section may be convicted, although the principal offender has not been convicted. The possession by any person of any stolen property shall be prima facie evidence of his guilt under this section."

. . . . . .

217.731 Prohibited acts involving dangerous drugs.

"(1) No person shall possess any dangerous drug:

(a) For his own use except as authorized in KRS 217.721 to 217.785 and 217.995.

(b) For purposes of sale or other disposal to another person except as authorized in KRS 217.-721 to 217.785 and 217.995."

. . . . . .

217.995 Penalties for violation of KRS 217.721 to 217.785.

"(1) Any person who violates any provision of subsections (2), (3), (4), and (5) of KRS 217.731

or who possesses any dangerous drug for the purpose of sale or other disposal to another person in violation of paragraph (b) of subsection (1) of KRS 217.731 shall be guilty of a felony and shall be punished by confinement in the penitentiary for not more than five years or by a fine of not more than $5,000 or both. Subsequent offenses shall be punished by confinement in the penitentiary for not more than ten years or by a fine of not more than $10,000 or both.

. . . . . .

"(3) (a) Any person in possession for his own use of any dangerous drug in violation of paragraph (a) of subsection (1) of KRS 217.731 shall be guilty of a misdemeanor and upon conviction shall be ordered to a facility designated by the Commissioner of the Department of Mental Health where a program of treatment and rehabilitation not to exceed one year in duration shall be prescribed. . . ." (1970 S 274, § 6, eff. 6-18-70. 1968 H 347, § 4)

STATEMENT

The petitioners, who are husband and wife, were arrested following the search of their home and farm premises by State Police with a search warrant procured upon information of a confidential informer that certain stolen property was upon the premises. The search commenced on the night of October 25, 1970, and lasted through the following day. In addition to a number of items alleged to be stolen property, the police seized a quantity of marijuana, weighing ap-

proximately twelve pounds, found in a burlap feed bag hanging in a shed attached to a barn on the farm. Subsequently each of the petitioners was indicted and tried for Possession of Dangerous Drugs (Marijuana) For Purpose of Sale and for nine counts of Knowingly Receiving Stolen Property. Each petitioner was convicted on the dangerous drug charge and sentenced to the maximum punishment, to wit, $5,000 fine and 5 years confinement. Petitioner Mary Jane Franklin was convicted on two counts of knowingly receiving stolen property; petitioner Donald Franklin was convicted on eight counts of this charge. Petitioners were sentenced to one year confinement on each of such convictions. All sentences were ordered to run consecutively, whereby Donald Franklin was committed for a total of 13 years confinement and Mary Jane Franklin, a total of 7 years. (The Kentucky Court of Appeals reversed the conviction of Mary Jane on the dangerous drug charge, thus reducing her sentence to confinement to 2 years.)

A.

During the conduct of the trial, out of the presence of the petitioners, counsel then representing petitioners agreed with the prosecution to the following stipulation:

> "It is stipulated that the people would testify that the property found that will be testified to from the named breakins was found on the Franklin property, that its' value was over $100.00, that it

was identified and was the property of the people who lost it in the breakin, to wit: it was stolen property." (TE 62, 63).

This stipulation, made in chambers, was not announced in open court and was, in fact made and entered into without the presence, knowledge or consent of the petitioners. The question of violation of due process assured by the Fourteenth Amendment concerning the above was raised by way of an assignment of error in petitioners' appeal brief and reply brief to the Kentucky Court of Appeals. Therein the petitioners contend that the presence of the defendant at every stage of trial on a felony charge is an essential condition of due process; that this stipulation concerns essential elements of proof of the prosecution's case and constituted a vital part of the proceedings. The pertinent portions are printed in the Appendix hereto, *infra,* pp. 23-24.

The Kentucky Court of Appeals held that the stipulation made by counsel did not violate any constitutional rights. (See the court's opinion, Appendix hereto, *infra,* pp. 25-30).

B.

Hearsay testimony, interjected by prosecution witness Trooper Slone to the effect that he had been told by Jack Johnson that said Johnson had been told by one Pem Guthrie (at that time deceased) that Donald Franklin had solicited the said Guthrie for the sale of marijuana, was highly prejudicial to the petitioners'

case. Both a motion to strike this inadmissible double hearsay testimony and admonish the jury (TE 143, 144) and to set aside the verdict and grant a new trial on this ground (TR 55) were overruled by the trial court. The question of violation of petitioners' constitutional rights of due process by this incompetent evidence was raised by way of assignment of error in the appeal brief. Relevant portions are printed in the Appendix hereto, *infra,* pp. 23-26. The Kentucky court ruled that no timely objection was made and thus the question was not before the court for review. Appendix, p. 27.

C.

No direct, competent evidence of any kind was introduced that the petitioners were in any way involved in the sale, attempted sale, or other disposal of the marijuana found by the police, or of past transactions of such nature. The only testimony in this respect was that of the two police officers to the effect that the marijuana was "processed and packaged for sale" and was in condition that it could be used. Trooper Slone testified that "You could smoke it right now", although "It could be dried a little more" (TE 89), in spite of the fact that more than six months had passed since seizure of the marijuana.

The question of the unconstitutional inference from this evidence that petitioner Donald Franklin's possession was for purposes of sale or other disposal to another person was raised by assignment of error in

the appeal brief, relevant portions printed in the Appendix hereto, *infra,* pp. 16-20. The opinion of the Kentucky court did not discuss or decide this question.

REASONS FOR GRANTING THE WRIT

1. The proceedings held out of the presence of the petitioners and the resulting stipulation, of which they had no knowledge, constituted admission of, at least, *prima facie* guilt of the charge of knowingly receiving stolen property. The Kentucky court's opinion in regard to the constitutional right of the accused to be present states:

> "The fundamental rights involved here are the right to meet one's accusers face to face, the right to cross-examine, and the right to be present before the court when important decisions are being made relating to one's liberty. We do not believe appellant was denied any of these rights." (Appendix, p. 16).

The petitioners contend that this is not only in conflict with this Court's decisions, but of previous holdings of the Kentucky court. That court has held that the presence of the defendant at every stage of trial on a felony charge is an essential condition of due process, guaranteed by both the state constitution and the federal constitution. In *Powell* v. *Commonwealth,* Ky., 346 S. W. 2d 731 (1961), the Kentucky court stated:

> "Like the right of the defendant to be present himself, his right to the effective assistance of

> counsel is a requirement of our Bill of Rights, Section 11, Ky. Const., and the presence of both is a condition of due process of law assured by the Fourteenth Amendment to the Federal Constitution."

The Kentucky court's opinion conflicts with the following decisions of this Court:

> *Snyder* v. *Mass.*, 291 U. S. 97;
> *Schwab* v. *Berggran*, 143 U. S. 442;
> *Hopt* v. *Utah*, 110 U. S. 574.

It is noteworthy, further, that the Kentucky court stated in its opinion that "All counsel's stipulation did was to save time and avoid the delay that would have been involved in producing the witnesses." Appendix, p. 16. It is contended that the accused's right to confrontation of witnesses is a constitutionally guaranteed right and is personal and can be waived only by the defendant. True, it has been held that where an accused is represented by counsel, the latter, in the *presence* and on behalf of the accused, may make an effective waiver of the privilege of confrontation. *Cruzado* v. *Puerto Rico* (CA 1 Puerto Rico) 201 F. 2d 789. In the instant case, the petitioners were not present and were incapable of consenting to a matter of which they were not informed. It is believed that the question presented here involves denial of due process by a method which has not been specifically considered by this Court, which we believe requires full review.

2. The incompetent hearsay testimony that petitioner Donald Franklin had offered marijuana for sale

went to the very crux of the offense charged and the highly prejudicial effect of this incompetent testimony upon the jury is reflected by the jury fixing the maximum punishment, there having been no competent evidence whatever of any sale or attempted sale, or any aggravating circumstances that ordinarily would warrant the excessive punishment. In this respect, it seems clear that the petitioner was deprived of a fair and impartial trial and thus, his constitutional right of due process was violated thereby. *Collum* v. *Butler,* 421 F. 2d 1257 (7th Cir.).

3. The Kentucky statutory law, set forth above, provides that possession of marijuana for one's own use is a misdemeanor, while possession for the purposes of sale or other disposal to another person is a felony, carrying a maximum punishment of a fine of $5,000 or imprisonment for 5 years, or both. The verdict, based on the competent evidence, of the petitioner Donald Franklin's guilt of the felony offense is tantamount to an inference of such guilt from his mere possession alone. The testimony of Trooper Slone that he had never seen marijuana *for use* packaged in this manner, itself tends to negate that the marijuana was intended for sale, since the logical inference would be to presume that disposal to another person would be to a user. The fact that this marijuana was "processed", that is, as Sergeant Watson testified "crumpled and ready to be rolled and smoked", does not allow the inference, to the exclusion of every other reasonable hypothesis, that the petitioner possessed this marijuana for the purpose of sale or other disposal to

another person. This question of the unconstitutional inference from the evidence, while raised by assignment of error, was not discussed or decided by the Kentucky court's opinion. It is contended that the petitioner's conviction in this respect is not in accord with the applicable decisions of this Court. As this Court stated in *Thompson* v. *Louisville,* 362 U. S. 199, "Just as 'Conviction upon a charge not made would be sheer denial of due process,' so is it a violation of due process to convict and punish a man without evidence of his guilt." An unconstitutional inference of this category is analogous to invalid statutory presumptions and inferences considered in the following cases:

Turner v. *U. S.,* 396 U. S. 398;
U. S. v. *Vasquez,* 429 F. 2d 615 (2d Cir.);
U. S. v. *Smart,* 448 F. 2d 931 (2d Cir.);
Leary v. *U. S.,* 395 U. S. 6.

CONCLUSION

For the reasons stated herein, it is respectfully submitted that the petitioners' petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

COURT OF APPEALS OF KENTUCKY

RENDERED: NOVEMBER 3, 1972

DONALD FRANKLIN and
MARY JANE FRANKLIN - - - - - *Appellants*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal from Shelby Circuit Court
Hon. George F. Williamson, Judge

OPINION OF THE COURT BY JUSTICE EARL T. OSBORNE—AFFIRMING IN PART—REVERSING IN PART

The appellants, Mary Jane Franklin and Donald Franklin, were jointly indicted and tried with Jack Johnson in the Shelby Circuit Court for the multiple offenses of receiving stolen property and possession of dangerous drugs. Jack Johnson did not appeal his conviction. Mary Jane Franklin was convicted of one offense of possession of dangerous drugs and sentenced to five years in the penitentiary and a fine of $5,000. She was convicted of two offenses of knowingly receiving stolen property and sentenced to one year's confinement in the penitentiary upon each offense. Donald Franklin was convicted of one offense of possession of dangerous drugs and sentenced to confinement in the penitentiary for five years and a fine of $5,000. He was convicted of eight offenses of knowingly receiving stolen property and sentenced to confinement in

the penitentiary for one year for each offense. Because of the complexity of the issues raised upon this appeal we will deal with the two appellants separately.

First, Mary Jane Franklin contends that her conviction for possession of dangerous drugs should be set aside because the proof was not sufficient to show that she was in possession of the drugs. The parties are husband and wife. Evidence for the Commonwealth establishes that they live on a farm. Mary Jane was a school teacher, teaching in the Jefferson County school system. Donald farmed the place upon which they lived and in addition did custom farm work by way of filling silos, bailing hay, etc., for others.

The marijuana which is the subject of the charges against the parties was discovered by officials in the course of a search of the farm. It was discovered in a barn some distance away from the dwelling house packaged in plastic bags and concealed in burlap bags and a lard can. Donald used the barn frequently in the course of his farming operations. Mary Jane denied that she was ever about the barn and denied that she had any knowledge of the marijuana in the barn or anything else for that matter. The Commonwealth did not prove that Mary Jane frequented the barn or had any reason to be there. The Commonwealth, in its brief, contends that since the deed to the farm was to Donald and Mary Jane in joint tenancy, Mary Jane was in constructive possession of the marijuana along with her husband, Donald, and cites Rupard v. Commonwealth, Ky., 475 S. W. 2d 473 (1971), in support of this position.

We have reexamined the Rupard case and find that it does not stand for the proposition that the owner of property can be convicted of constructive possession of drugs found thereon merely because of his ownership. In the Rupard opinion we cite a lengthy annotation upon the subject contained in 91 ALR 2d 810. An analysis of the cases contained in this annotation would indicate that the general rule relating to the possession of dangerous drugs is that

the possession need not be exclusive. Two or more persons may be in possession of the same drug at the same time and this possession does not necessarily have to be actual physical possession. It may be constructive as well as actual. We have found no cases where the owner of property has been convicted of possession of drugs without proof that he knew or should have known that the drugs were on the property, nor have we found any cases where the wife was convicted when the drugs could have been in the exclusive possession of the husband. In fact we have found no case sustaining a defendant's conviction of illegal possession of drugs where the proof did not establish either directly or by strong inference that the defendant had knowledge of the presence of the drug.

We do not believe the Commonwealth has sufficiently shown that Mary Jane Franklin had knowledge of the presence of the marijuana in the barn. For this reason the conviction for the possession of dangerous drugs will have to be reversed as to Mary Jane Franklin.

Mary Jane was convicted of two offenses of knowingly receiving stolen property. The property here involved is two television sets. She now contends the evidence was not sufficient to support the verdict.

The evidence is conflicting but we are of the opinion that the jury could well have believed that she had knowledge that the sets were stolen. There is no conflict with the assertion that she had them in her possession and was involved in a transaction relative to the sale of one of the sets.

She contends upon this appeal that the Commonwealth did not establish that the sets were stolen. It appears from an examination of the record that her attorney, in chambers, stipulated that the property was stolen and agreed to waive the requirement that the Commonwealth bring in victims of the thefts to establish this fact. Mary Jane now contends that her attorney had no right to make such conces-

sion and that, since this took place in chambers out of her presence, it deprived her of the right to be present at her trial and the judgment should be reversed. She cites in support of this contention Section 11 of the Kentucky Constitution, along with Powell v. Commonwealth, Ky., 346 S. W. 2d 731 (1961). We have examined the Powell case. The facts of that case reveal that the verdict was received and a death penalty imposed while the defendant's attorney was temporarily absent from the court room. We do not believe that was a comparable situation to the one here before us.

Trial practice requires during the course of the proceeding on many occasions that counsel confer with the court. As a matter of practice, historically and traditionally, these conferences have been held out of the presence of the jury and in many instances without the presence of the parties to the litigation. There is nothing unusual about this procedure and we do not believe that it in any way deprives the accused in a criminal proceeding of his right to be present at his trial.

The fundamental rights involved here are the right to meet one's accusers face to face, the right to cross-examine, and the right to be present before the court when important decisions are being made relating to one's liberty. We do not believe appellant was denied any of these rights.

The stipulation that counsel made relative to the proof likewise did not violate any constitutional right. It is not contended that the Commonwealth could not have proved the television sets in question were stolen. All counsel's stipulation did was to save time and avoid the delay that would have been involved in producing the witnesses.

Appellant makes other contentions of error. She objects to the fact that the trial court did not grant her and her husband a separate trial from that of Jack Johnson.

She also objects to the order of the court trying all ten indictments at the same time.

We find no merit in these contentions. This was a matter that addressed itself to the discretion of the trial court. We find no abuse of that discretion.

Both appellants contend the judgment should be reversed because the trial court admitted certain hearsay evidence. No objection was made at the time and this question was not properly preserved for appellate review.

The judgment convicting Mary Jane Franklin of knowingly receiving stolen property on two counts and confining her in the penitentiary for one year on each of said counts is affirmed. The judgment for possession of dangerous drugs sentencing her to five years in the penitentiary and a fine of $5,000 is reversed.

Donald Franklin basically makes the same contentions relative to his conviction for knowingly receiving stolen property as those made by Mary Jane Franklin. Therefore, we will not deal with these contentions separately as our answer to Donald would be the same as our answer to Mary Jane. Therefore, the portion of the judgment against Donald confining him to the penitentiary for one year on each of eight counts for knowingly receiving stolen property is affirmed. We are of the opinion that the evidence against Donald was sufficient to support his conviction of possession of dangerous drugs. However, we are of the further opinion that the case will have to be remanded to the circuit court for resentencing because of a defect in the verdict.

The verdict of the jury finding Donald guilty read as follows:

> "One (1) offense of possession of dangerous drugs —confinement for *five years* and/or by a fine of *$5,000.00*." (Emphasis added.)

The trial court submitted a prepared verdict to the jury. Since the punishment for possession of dangerous drugs carries both a fine and a penitentiary sentence, the form verdict was apparently prepared in this form with the idea that the jury could given both time in the penitentiary and a fine or could give one without the other. This was done by the use of the "and/or" phrase. It may have been that the trial court anticipated that the jury would strike either the word "and" or "or" thus completing the verdict, however, this would not accomplish the desired result. If the word "and" had been stricken from the verdict, the result would have been a term of five years or a fine of $5000 thus requiring the trial court to elect which should be imposed, thereby rendering the verdict ineffective. It appears the form of the verdict as presented could be considered calculated to encourage the jury to give both imprisionment and fine. We find the verdict as it was rendered by the jury patently unintelligible and impossible for the trial court to interpret without speculation insofar as the degree and extent of punishment are concerned.

There is no doubt about the verdict insofar as the jury finding the defendant guilty. This court has held through a long line of cases that formal defects in a verdict are waived by the accused's allowing the discharge of the jury without moving the court to recommit the jury for the correction of the verdict. See Gillum v. Commonwealth, Ky., 121 S. W. 445 (1909); Williams v. Commonwealth, Ky., 130 S. W. 807 (1910); Underhill v. Commonwealth, Ky., 289 S. W. 2d 509 (1956). Since the verdict in this case is only defective as it relates to the punishment to be inflicted and as the right to have the jury fix the punishment in this jurisdiction is procedural, RCA 9.84, we are of the opinion that it can be waived. It is generally held that an accused in a criminal prosecution has the right to object to an insufficient verdict but failure to do so waives any defect in the verdict. See 23A C.J.S., Criminal Law, §1416.

"Accused has the right to object to an insufficient verdict and to insist that the defects or omissions therein be corrected. On the other hand, although no duty rests on an accused to have corrected a faulty verdict returned against him, the rendering of a verdict is subject to the same rules with respect to objections, exceptions, and waivers as apply to all other parts of the trial, and defects in the verdict or in the reception thereof may be waived by accused.

"An informal verdict should be objected to when it is returned, and the attention of court called to its defective form so that it may be corrected, and if accused allows the discharge of the jury without raising his objections, and without moving for a correction of the verdict, he thereby waives formal defects in the verdict; but he does not waive his right to object on the ground that the verdict does not respond to his special plea. A failure to object to a defective verdict when it is rendered waives the right to move for a venire de novo. An exception to a verdict that it is contrary to the law and the evidence is not sufficiently specific.

An objection that the sentence is not supported by the verdict, when properly construed, is not waived by a failure to object to the form of the verdict, or to its reception by the court."

We are of the opinion that Donald's failure to object to the form of the verdict waived his right to have the jury fix the punishment. Since it is apparent that the trial court based the judgment upon the defective verdict it will have to be set aside and the case remanded to the trial court to fix punishment as if a guilty plea had been entered without regard to the verdict.

Therefore, the case against Donald is affirmed as to the eight counts of knowingly receiving stolen property and

remanded to the circuit court for the fixing of punishment and judgment on the one offense of possession of dangerous drugs.

The judgment is affirmed in part, reversed in part, and the case remanded for further proceedings.

All concur.

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APPENDIX B

THE COMMONWEALTH OF KENTUCKY

The Court of Appeals
Fall Term—November 3, 1972

Donald Franklin & Mary Jane Franklin

v.

Commonwealth of Kentucky
Appeal from a Judgment of the Shelby Circuit Court

PETITION FOR REHEARING IS OVERRULED—OPINION MODIFIED—February 16, 1973

MANDATE

The Court being sufficiently advised, it seems the judgment herein is erroneous in part.

It is therefore considered that the judgment be affirmed in part and reversed in part with directions to correct the judgment in conformity with the views expressed in the opinion herein; which is ordered to be certified to said court.

It is further considered that the appellee recover of the appellants its cost herein expended.

/s/ Frances Jones Mills, C.C.A.

A Copy—Attest:
Issued Friday, February 16, 1973

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. A-1185

Mary Jane and Donald Franklin - - Petitioners

v.

Kentucky

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 16, 1973.

/s/ Potter Stewart
Associate Justice of the Supreme
Court of the United States

Dated this 30th day of May, 1973

APPENDIX D

COURT OF APPEALS OF KENTUCKY

File No. F-24-71

Mary Jane Franklin and
Donald Franklin - - - - - - - Appellants,

v.

Commonwealth of Kentucky - - - - Appellee.

Appeal from Shelby Circuit Court

BRIEF FOR APPELLANTS

. . . . . .

III. The appellants were deprived of constitutional Due Process by proceedings had in their absence during the trial.

At proceedings had in Chambers the following was stipulated:

"STIPULATION:

It is stipulated that the people would testify that the property found that will be testified to from the named breakins was found on the Franklin property, that its' value was over $100.00, that it was identified and was the property of the people who lost it in the break-in, to-wit: it was stolen property." (TE 62, 63).

The appellants were not present at these proceedings and, in fact, did not know this stipulation was made, nor

did they consent to it or ratify it. (See Exhibit A, Appendix to Brief.)

As stated in our argument above, concerning insufficiency of the evidence, this stipulation concerns essential elements of proof of the Commonwealth's case. It constituted a vital part of the proceedings.

This Court has held that the presence of the defendant at every stage of trial on a felony charge is an essential condition of due process, guaranteed by both our state constitution and the federal constitution.

"Like the right of the defendant to be present himself, his right to the effective assistance of counsel is a requirement of our Bill of Rights, Section 11, Ky. Const., and the presence of both is a condition of due process of law assured by the Fourteenth Amendment to the Federal Constitution."

Powell v. *Commonwealth,* Ky., 346 S. W. 2d 731 (1961).

And, it has been held that the right of a defendant to be present at every stage of his trial is absolute, and counsel's express consent to the court's action could not operate to waive the right.

Saul v. *State,* Md., 252A 2d 282.

We are reminded, as this Court quoted the late Mr. Justice Cardozo, in the *Powell* case, supra:

> "A criminal, however shocking his crime, is not to answer for it with forfeiture of life or liberty till tried and convicted in conformity with law." (p. 734).

It is contended that the proceeding in appellants' absence deprived them of due process of law and constituted reversible error.

. . . . . .

APPENDIX E

COURT OF APPEALS OF KENTUCKY

File No. F-24-71

Mary Jane Franklin and
Donald Franklin - - - - - - Appellants

v.

Commonwealth of Kentucky - - - - Appellee

Appeal from Shelby Circuit Court

APPELLANTS' REPLY BRIEF

. . . . . .

II

Incompetent hearsay testimony interjected by Commonwealth witness Trooper Slone was highly prejudicial and constituted reversible error.

On cross-examination of Commonwealth witness Trooper Slone by counsel for appellants', a portion of the testimony went as follows:

"Q. 181. . . . You don't know that they sold any hemp, do you?

A. No sir, I can't say that they sold any hemp, no sir. (TE 112).

Q. 182. You don't know if they tried to sell it to anybody either, do you?

A. No, I have my own opinion about it, but this would be all that I could give you.

Q. 183. Well, now, wouldn't it be quite a bit of guesswork that the hemp you referred to was for sale?

A. The only thing that I can say on that, Mr. Green, is to go by what I learned through my investigation about this hemp being for sale.

Q. 184. There wasn't any kind of price put on it, was there, there was no price tag on any of it?

A. No sir, like I say, the only thing that I knew is that I talked to some people through investigation that Donald had tried to sell this before.

Q. 185. You say . . . what was that?

A. I said that through investigation I learned that Donald had tried to sell this to different people.

Q. 186. That he had tried to sell it?

A. Yes sir.

Q. 187. Have you got witnesses that can say that?

A. Yes sir, there is a man that told me this.

Q. 188. Are you going to bring him into Court, are they going to testify to that?

A. I don't know, you will have to talk to the Commonwealth Attorney about it." (TE 113).

. . . . . .

Re-Direct By Mr. Kinsolving:

"Q. 204. You stated to Mr. Green that from your investigation you found out that Donald Franklin was trying to sell marijuana. Who did he try to sell it to?

A. Through my investigation, he was trying to sell some to Pem Guthrie at the fish market located on East—.

Q. 205. Where is Pem Guthrie today?

A. Pem Guthrie is dead at this time.

Q. 206. And where did you get that information?

A. Jack Johnson.

Q. 207. From Jack Johnson?

A. Yes sir." (TE 117).

On direct, Trooper Slone had testified not only concerning the discovery of the marijuana, but also concerning the many occasions he had observed marijuana in various stages, and that this marijuana was ready for use and that "in this type package I would say it was going to be sold" (TE 89, 91).

Counsel's cross-examination was aimed at this direct testimony. The highly incompetent hearsay testimony interjected by the witness was unsolicited and compounded by the re-direct examination by the Commonwealth's Attorney. It was this portion of the testimony that revealed that the witness was testifying not only to double hearsay, but that the person who was the original source of the statement was now dead.

The appellants' motion to strike this inadmissible testimony and to admonish the jury to disregard these statements was overruled (TE 143, 144). Also, appellants' motion to set aside verdict and grant new trial on this ground (TR 55).

As was stated by this Court in the recent opinion in *Greenville* v. *Commonwealth*, Ky., 467 S. W. 2d 765 (1971):

> "It does not require an examination of hoary precedents to recognize at once that this unsolicited and incompetent hearsay information interjected by Dessie was extremely prejudicial to Arthur's case. Certainly the question asked by defense counsel was not calculated to invite such an unresponsive answer. It went to the very crux of the case, and we think it clearly called for a mistrial." (p. 766).

Similarly, this Court reversed the conviction where hearsay was admitted that defendant had admitted killing.

Salisbury v. *Commonwealth*, Ky., 417 S. W. 2d 244.

The highly prejudicial effect of this incompetent testimony upon the jury is reflected by the jury fixing the

maximum punishment for the offense, there having been no competent evidence whatsoever of any sale or attempted sale, or any aggravating circumstances, that would ordinarily warrant the excessive punishment.

Clearly, the appellants were deprived of a fair and impartial trial as a result of this incompetent testimony and their constitutional rights of due process were violated thereby.

Collum v. *Butler*, 421 F. 2d 1257 (7th Cir.)

. . . . . .

C. The appellants' convictions violate constitutional Due Process.

The appellants' convictions violate the Due Process Clause of the United States Constitution and Sections 2 and 11 of the Kentucky Constitution, and CR 9.26.

The Commonwealth failed to establish even a *prima facie* case against the appellants, and the evidence was far from sufficient to prove their guilt beyond a reasonable doubt. A conviction upon insufficient evidence is in violation of constitutional guarantees.

As stated by the Supreme Court:

> "Thus we find no evidence whatever in the record to support these convictions. Just as 'Conviction upon a charge not made would be sheer denial of due process,' so is it a violation of due process to convict and punish a man without evidence of his guilt."
>
> *Thompson* v. *Louisville*, 362 U. S. 199, 80 S. Ct. 624, 4 L. Ed. 2d 654.

The Supreme Court has ruled in a series of cases relating to invalid presumptions drawn from possession, that such presumptions unconstitutionally deprive the defendant of the presumption of innocence, cast upon him the burden of proving that he was not guilty, and by obligat-

ing him to rebut the presumptions, tended to compel him to testify in violation of his privilege against self incrimination.

As discussed above, at best, there was only slight evidence tending to prove appellant Donald Franklin's possession of the marijuana. Conceding that the jury did believe the marijuana belonged to Franklin, appellant challenges the validity of the presumption that would infer his possession was for the purpose proscribed by the statutory offense.

Turner v. *U. S.*, 396 U. S. 398, 90 S. Ct. 642, 24 L. Ed. 2d 610 (1970).

U. S. v. *Vasquez*, 429 F. 2d 615 (2d Cir. 1970).

U. S. v. *Smart*, 448 F. 2d 931 (2d Cir. 1971).

Leary v. *U. S.*, 395 U. S. 6, 89 S. Ct. 1532, 23 L. Ed. 57 (1969).

In a recent case involving much stronger incriminating circumstances than this, a United States Circuit Court of Appeals held that a jury could not infer, to the exclusion of every other reasonable hypotheses, that a co-defendant knew that heroin was being transported, concealed or sold in house in which she lived where there was no testimony that defendant would recognize heroin for what it was when she saw it, and even the fact that she received money and at same time observed substance later proved to be heroin did not of itself establish a complicity in the crime in absence of some evidence that she knew or should have known that heroin transaction was taking place.

U. S. v. *Ramirez*, 441 F. 2d 950, cited in July 13, 1971, S. W. 2d Reporter.

. . . . . .

III.

The "bone" of contention concerning the stipulation is that it was made and entered into without the presence,

knowledge or consent of the appellants and that the right of the defendant to be present at every stage of his trial is absolute.

The appellee's brief, on page 4, cited *Link* v. *Wabash* (U. S. Supreme Court). This appellee indirectly raised an issue that we had not presented, that is, whether or not the appellants were effectively represented at the trial.

We cannot conceive the *Link* case being applicable to criminal procedure. It related strictly to a civil action.

In regard to appellants being charged with acts or omissions of counsel, the following is cited:

> Failure of defendant's counsel to object to his client's being tried in prison clothing because he thought such objection would be frivolous was not tantamount to a voluntary waiver of objection by defendant. "The probable impact on the jury of Hernandez' appearance in the courtroom makes it impossible for us to declare a belief that it was harmless beyond a reasonable doubt." *Hernandez* v. *Beto,* 443, F. 2d 634 (5th Cir. 1971)
>
> . . . . . .

73-132

Supreme Court, U. S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term

No. A-1185

MARY JANE FRANKLIN and
DONALD FRANKLIN ..... Petitioners

vs.

COMMONWEALTH
OF KENTUCKY ..... Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion below from the Kentucky Court of Appeals is styled *Donald Franklin and Mary Jane Franklin* v. *Commonwealth of Kentucky*, Ky., 490 S.W.2d 148 (1972).

JURISDICTION

Petitioners' application to invoke the jurisdiction of this Court fails to meet the jurisdictional require-

ments of 28 U.S.C. §1257(3), the proper provision for the review of a state court judgment by certiorari in a criminal case. The questions the petitioners attempt to present here under the Fourteenth Amendment to the Constitution of the United States have never been properly presented to or decided by the courts of Kentucky so as to give this Court jurisdiction to review the judgment. A review of the record of the state court proceedings in the instant case shows the petitioners did not specifically set out or raise a Federal question with the required particularity so as to bring such question to the attention of the state courts. In *Oxley Stave Company* v. *Butler County*, 166 U.S. 648, 41 L.ed 1149, 17 S.Ct. 1003 (1896), this Court said:

> ". . . the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right."

In raising the Federal question, it is necessary that the question be presented in the state court in such a manner that there is no doubt that reliance is upon Federal rights rather than state rights. See *New York Central and Hudson River Railroad Co.* v. *New York*, 186 U.S. 269, 46 L.ed 1158, 22 S.Ct. 916 (1901).

This application for writ of certiorari should be denied because petitioners failed to set out or raise a Federal question with sufficient definiteness so as to bring such question to the attention of the state courts and

petitioners did not present the questions to the state courts in such a manner that there was no doubt that they were asserting Federal rights instead of state rights.

Even if petitioner could be said to have raised a Federal question by intendment, it would be of no consequence in the present case. The decision of the state court was based upon a nonfederal ground, i.e., on state law; and this Court, in *Murdock* v. *Memphis*, 20 Wall 590, 22 L.ed 429 (1875), stated that it would not review a state court judgment if there is an adequate and independent state ground which supports the decision of the state courts.

Notwithstanding that petitioners have probably raised in state courts the questions they present here, the Court should decline to review because the judgment of this case was reached upon a nonfederal ground which independently and adequately supports the decision reached by the state court. The petitioners have also failed to set forth with sufficient definiteness the fact that they intended to assert a Federal right rather than a state right. Thus, the determination of the questions the petitioners bring here was unnecessary by the state court in its decision of this case.

STATEMENT OF THE QUESTIONS PRESENTED

I. WHETHER THE STIPULATION MADE BY PETITIONERS' COUNSEL VIOLATED PETITIONERS' FUNDAMENTAL RIGHTS.

II. WHETHER THE COURT OF APPEALS OF KENTUCKY CORRECTLY RULED THAT PETITIONERS' FAILURE TO OBJECT TO ALLEGEDLY INCOMPETENT HEARSAY TESTIMONY BARRED THEM FROM ASSERTING THAT QUESTION ON APPEAL.

III. WHETHER THERE WAS A STATUTORY PRESUMPTION OR INFERENCES CONCERNING PETITIONERS' GUILT.

STATUTORY PROVISIONS INVOLVED

Kentucky Revised Statutes

KRS 217.731:

"(1) No person shall possess any dangerous drug:

(a) For his own use except as authorized in KRS 217.721 to 217.785 and 217.995.

(b) For purposes of sale or other disposal to another person except as authorized in KRS 217.721 to 217.785 and 217.995."

* * *

KRS 217.995:

"(1) Any person who violates any provision of subsections (2), (3), (4), and (5) of KRS 217.731 or who possesses any dangerous drug for the

purpose of sale or other disposal to another person in violation of paragraph (b) of subsection (1) of KRS 217.731 shall be guilty of a felony and shall be punished by confinement in the penitentiary for not more than five years or by a fine of not more than $5,000 or both. Subsequent offenses shall be punished by confinement in the penitentiary for not more than ten years or by a fine of not more than $10,000 or both."

* * *

"(3)(a) Any person in possession for his own use of any dangerous drug in violation of paragraph (a) of subsection (1) of KRS 217.731 shall be guilty of a misdemeanor and upon conviction shall be ordered to a facility designated by the Commissioner of the Department of Mental Health where a program of treatment and rehabilitation not to exceed one year in duration shall be prescribed. . . ."

STATEMENT OF THE CASE

Petitioners' statement of the case is substantially correct. Additional material facts and corrections will be set out in the respective arguments which follow.

ARGUMENT

I.

THE STIPULATION MADE BY PETITIONERS' ATTORNEY DID NOT VIOLATE PETITIONERS' FUNDAMENTAL RIGHTS.

Petitioners contend that the stipulation concerning stolen property made by their attorney (allegedly without their knowledge or consent) was a violation of their constitutional right of confrontation of witnesses. The Kentucky Court of Appeals ruled that the fundamental rights of the petitioners were not denied by this stipulation. It is a recognized principle that a privately retained attorney acts on his client's behalf and is required to make decisions concerning legal issues. The stipulation made by petitioner's attorney was made in order to save time and it was a decision based upon legal considerations.

It has been held by this Court that the occasional absence of the accused in the trial is not reversible error when there is no injury to his substantial rights. *Howard* v. *Kentucky*, 200 U.S. 164, 50 L.ed 421, 26 S.Ct. 189 (1906). It could be assumed that counsel who is duty bound to represent his clients to the utmost of his ability would not make such a stipulation if he thought it would adversely affect his client's case. The Sixth Amendment's right of confrontation, which has been held applicable to the states in a decision by this Court, requires that the defendant have the right to confront his accusers and cross-examine them face to face. This Court has stated in *Snyder* v. *Massachusetts*, 291 U.S. 97, 78

L.ed 674, 54 S.Ct. 330 (1934), "Nowhere in the decisions of this Court is there a dictum, and still less a ruling, that the Fourteenth Amendment assures the privilege of presence when presence would be useless, or the benefit but a shadow." It appears, therefore, the Kentucky Court properly ruled that there was no violation of petitioners' substantial rights when this stipulation was made by counsel for petitioners.

II.

THE COURT OF APPEALS OF KENTUCKY CORRECTLY RULED THAT PETITIONERS' FAILURE TO OBJECT TO ALLEGEDLY INCOMPETENT HEARSAY TESTIMONY BARRED THEM FROM ASSERTING THAT QUESTION ON APPEAL.

Petitioners claim that incompetent hearsay testimony was admitted as evidence and was highly prejudicial to them. The Kentucky Court of Appeals ruled that: "No objection was made at the time and this question was not properly preserved for appellate review." The requirement that a defendant make a contemporaneous objection to allegedly inadmissible evidence serves a legitimate state purpose and was not formulated to bypass or defeat any of the petitioners' Federal constitutional rights. *Henry* v. *Mississippi*, 379 U.S. 443, 13 L.ed 2d 408, 85 S.Ct. 564 (1965).

This Court, therefore, has no jurisdiction to review this alleged error since the review was barred by the failure to make a timely objection and the rule

requiring a timely objection serves a legitimate state interest.

III.

THERE IS NO STATUTORY PRESUMPTION AS TO GUILT SO NONE OF PETITIONERS' RIGHTS WERE VIOLATED.

Petitioners contend that their constitutional rights were violated due to the fact that there was some type of inference of guilt of a felony offense from his mere possession of marijuana alone. The petitioners, in their application for writ, set forth cases which invalidate statutes which create a presumption or an inference of guilt. The applicable statute as set forth in this case has no presumption or inference included in it. The statute merely sets forth the penalties for possession of a dangerous drug for purposes of sale and provides for a less penalty for possession for one's own use.

Nowhere in the state court proceedings, including the instructions, was the jury apprised of any type of inference which stated that possession of a certain amount of marijuana would be a presumption of possession for sale. The jury was merely instructed on the offense and penalties as set forth in the statute and was allowed to decide whether the petitioners possessed the marijuana for their own use or for sale or disposal to another. This in no way could be construed as an unconstitutional statutory presumption.

The Court of Appeals correctly decided that the

evidence was sufficient to sustain the conviction of the petitioner Donald Franklin and since there is no statutory presumption, it was unnecessary for the Kentucky court to decide this issue.

CONCLUSION

The petitioners have failed to properly meet the jurisdictional requirements or to present a substantial Federal question necessary for the consideration of this Court. For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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